Supreme Court of the United States

OCTOBER TERM, 1927.

No. 211.

T. H. SMALLWOOD, W. F. SMALLWOOD, A. D. SMALLWOOD, et al., etc.,

Petitioners,

—vs.—

JUAN G. GALLARDO, TREASURER OF PORTO RICO.

No. 212.

ADOLFO VALDES ORDONEZ, SALVADOR GARCIA, VICTOR OCHOA, et al., etc.,

Petitioners,

—vs.—

JUAN G. GALLARDO, TREASURER OF PORTO RICO.

No. 213.

INSULAR MOTOR CORPORATION,

Petitioner,

—vs.—

JUAN G. GALLARDO, TREASURER OF PORTO RICO.

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

On certiorari to the Circuit Court of Appeals for the First Circuit (71 L. ed. 868; 47 Sup. Ct. 659) to review a decision in a group of cases, of part of which those at bar are typical (*Porto Rico Tax Appeals*, 16 Fed. (2d) 545).

The order of May 16, 1927, awarding the writs set the cases for hearing on October 3 next

> "on the sole question whether they have become moot by virtue of the act of March 4, 1927, amending section 48 of the organic act of Porto Rico."

Statement.

Petitioners are dealers in automobiles, doing business in Porto Rico. The cars are imported from continental United States. On arrival the ocean carrier delivers them in original packages to petitioners.

In 1923 the legislature of Porto Rico laid an *ad valorem* tax of 10% and in 1925 of 7% on the automobiles. Petitioners brought bills in the District Court of the United States for Porto Rico to enjoin the respondent from collecting the tax and from seizing their property for its nonpayment (R. 2-13, 59-70, 76-84). The principal ground of attack is that the statutes violate a provision of the Organic Act prohibiting levy of duties on merchandise going into Porto Rico from the United States (R. 10-11, 67-8, 81). The District Court, after hearing two of the cases on proof and one on motion (R. 22-52, 71, 84-7, 111-120), dismissed the bills (R. 57-8, 71-3, 107-8) and its decrees were affirmed by the Circuit Court of Appeals for the First Circuit (R. 153-4).

The District Court was of opinion that complainants had an adequate remedy at law. This consisted of payment under protest and actions to recover the amounts claimed to have been improperly exacted (R. 53, 72, 89-105). The Court of Appeals held with petitioners on the form of remedy they pursued, but adverse to them on the merits (R. 150-2).

Subsequent to determination of the causes in the Court of Appeals, §48 of the Organic Act (39 *Stat.* 967, c. 145; *U. S. Code*, Title 48, §872) was amended by §7 of the Act of March 4, 1927 (*Public* No. 797, Second Session, 69th Congress; *U. S. Code, Supp.* No. 3, April, 1927, p. 92; *Fed. Stats. Ann., Supp.* No. 3, April, 1927, p. 92; 44 *Stat.* , c. 503), adding the following:

"That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico."

Taxes.

The statute laying the tax complained of in Nos. 211-2 (Laws of 1923, pp. 450, 458) provides in section 20, subdivision 18, as follows:

> "Section 20. That there shall be levied, collected and paid, for one time only, as an internal-revenue tax on each of the following articles: • • •
>
> 18. *Motor vehicles.* On every motor vehicle, automobile, • • • produced, manufactured, sold or used in Porto Rico, a tax of ten (10) per cent *ad valorem*."

The statute prescribing the tax complained of in No. 213 (Laws of 1925, pp. 590, 596) provides in section 16, subdivision 15, as follows:

> "Section 16. There shall be collected and paid, once only, an internal revenue tax on each of the following articles: • • •
>
> 15. *Motor vehicles.* On every motor vehicle such as automobiles, • • • sold, transferred, used or consumed in Porto Rico, a tax of seven (7) per cent *ad valorem*."

Jurisdiction.

Due to the restrictive terms of the order under which we are now processing, recital of the grounds of jurisdiction, set out in the petition for certiorari (pp. 8-9), is omitted. Likewise for the reason that this Court has precluded present discussion of the subject, as well as for the reason that the

respondent is not being heard on cross-assignments of error, it will be assumed that the court below was correct in holding (R. 150-1) that prior to March 4, 1927, owing to inadequacy of the remedy at law, the District Court for Porto Rico was vested with power to issue the injunctions prayed for (in regard to which petitioners' contention is set out in the record, pp. 138-150).

Propositions.

The statutory change has not rendered the cases moot, because

(1) The Act of March 4, 1927, did not affect cases pending at the time of its passage.

Gallardo v. *Porto Rico Ry., Light & Power Co.*, 18 Fed. (2d) 918, 925 (1 C. C. A., 1927).

(2) If the Act of March 4, 1927, had been in effect when the suits were commenced, it would not have deprived the District Court for Porto Rico of power to grant the relief sought.

Hill v. *Wallace*, 259 U. S. 44, 62.

(3) The authorities relied on by respondent are inapplicable.

ARGUMENT.

I.

The Act of March 4, 1927, did not affect cases pending at the time of its passage.

§§24 and 267 of the Judicial Code authorize a district court of the United States to entertain, and to grant injunctions in, equity suits involving upwards of $3,000, exclusive of interest and costs, arising under the laws of the United States, where there is no adequate remedy at law.

§41 of the Organic Act, as later shown, gives the District Court for Porto Rico the jurisdiction of a district court of the United States. As it is being taken for granted that, in exercise of that power, the District Court for Porto Rico, upon application to it at any time up to March 4, 1927, ought to have issued the injunctions prayed for in the bills, it follows that the question the parties are directed to argue is confined to whether, without amendment to or change of §§24 and 267 of the Judicial Code or §41 of the Organic Act, a mere prohibition against the present type of suit being "maintained" is sufficient to oust jurisdiction in cases already pending. The problem turns exclusively on the meaning of "maintained."

(1) Where the precise issue has arisen it has been squarely, and it is believed uniformly, held by courts other than this, including the Circuit Court of Appeals for the First Circuit, that the language of the Act of March 4, 1927, does not apply to suits brought before that date (*Gallardo v. Porto Rico Ry., Light & Power Co.*, 18 Fed. (2d) 918, 925, 1 C. C. A., 1927; *Moon v. Durden*, 2 Exch. (W. H. & G.) 22, 32 45, 154 *English Rep.* (full reprint) 389; *Knight v. Lee*, 1893, 1 Q. B. 41; *Burbank v. Inhabitants of Auburn*, 31 Me. 590, 591; *Delta Bag Co. v. Kearns*, 160 Ill. App. 93, 99 100, 105; *Smith v. Lyon*, 44 Conn. 175, 178; *Gumpper v. Waterbury Traction Co.*, 68 Conn. 424; *Brucon v. North Yakima School Dist. No. 7*, 101 Wash. 374, 378 9; *Creditors' Adjustment Co. v. Rossi*, 26 Cal. App. 725, 727; *Grasso v. Holbrook, etc. Co.*, 102 N. Y. App. Div. 49, 51 2; *Union Carlisle Bank v. Brown*, 5 Ohio C. D. 94).

So far as discovered, this Court has not directly passed on the same language. Nevertheless, it has firmly established canons of statutory interpretation which are inconsistent with any other conclusion.

(2) There is a presumption that a statute does not apply to a case pending at the time of its enactment (*McEwen v. Den*, 24 How. 242, 244; *Twenty Per Cent. Cases*, 20 Wall.

179, 187; *Shwab* v. *Doyle*, 258 U. S. 529, 534; *Lewellyn* v. *Frick*, 268 U. S. 238, 251-2; *United States* v. *St. Louis, etc., Ry. Co.*, 270 U. S. 1, 4).

This principle has been reiterated in a variety of forms. Thus it has been said that, despite the words employed and although literally the language covers existing cases, unless the contrary plainly be required new statutes will be applied only to "future cases" (*McEwen* v. *Den*, at p. 244) or "cases that may hereafter arise" (*Twenty Per Cent. Cases*, at p. 187) and will not be applied to "cases which arose before their passage" (*Shwab* v. *Doyle*, at p. 534).

Much ancient learning on the subject is assembled in *Dash* v. *VanKleeck*, 7 Johns. R. 477, 501-9, and *Gould* v. *Hayes*, 19 Ala. 438, 450-1. The State decisions generally are in accord. For example, see *Gerry* v. *Stoneham*, 1 Allen 319, 322-3; *Dickens* v. *Dickens*, 174 Ala. 305, 310-1; *Wallace* v. *Oregon Short Line R. R. Co.*, 16 Ida. 103, 114-5; *Rogers* v. *Greenbush*, 58 Me. 395, 397; *Auditor General* v. *Chandler*, 108 Mich. 569, 571; *Trist* v. *Cabezas*, 2 Rob. (N. Y.) 708, 710, 18 Abb. Pr. 143, 144-5; *Bates* v. *Stearns*, 23 Wend. 482; *Merwin* v. *Ballard*, 66 N. C. 398, 399; *Lilly* v. *Purcell*, 78 N. C. 82; *Newson* v. *Greenwood*, 4 Oregon 119, 121-2.

An apt statement on the point in *Trist* v. *Cabezas*, cited with approval in *Fitzpatrick* v. *Boylan*, 57 N. Y. 433, 437, was this (p. 710):

> "In all statutes which affect or change a remedy, it is but fair to presume that it was intended to exempt pending cases and proceedings from their operation, unless the contrary appears; • • • When the statute is silent, it must be presumed that it was the intention to limit its operations to the period of time when it took effect, and to fasten its provisions only upon such proceedings as might be commenced thereafter."

(3) No doctrine has been more steadily adhered to by this Court than that statutes will be given prospective

operation only unless it clearly, unequivocally and affirmatively appear that it was the legislative intention to have them operate retrospectively.[1] Thus, some of the adjectives employed to describe the kind of requirement which alone will justify construing the language of a statute as retroactive in effect are "imperative" (*United States* v. *Heth*, 3 Cranch at p. 413; *Auffm'ordt* v. *Rasin*, 102 U. S. at p. 622; *United States Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. at p. 314), "indispensable" (*Reynolds* v. *McArthur*, 2 Peters at p. 434), "irresistible" (*Carroll* v. *Lessee of Carroll*, 16 How. at p. 281), "necessary" (*Harvey* v. *Tyler*, 2 Wall. at p. 347) and "manifest" (*Shreveport* v. *Cole*, 129 U. S. at p. 43).

Three illustrations on the facts will suffice.

In *Twenty Per Cent. Cases*, 20 Wall. 179, a resolution of February 28, 1867 (14 *Stat.* 569), granted to certain Government employes serving at Washington a gratuity of 20% on their salaries or pay for the fiscal year ending June 30, 1867. By §4 of the Act of July 12, 1870 (16 *Stat.* 250, c. 251), it was provided that all acts and resolutions granting extra compensation or pay "be, and the same are hereby, repealed, to take effect on the first day of July, eighteen hundred and seventy."

Some suits were pending at the date of the repealing act, and some were brought thereafter, in the Court of Claims (p. 180) to recover under the resolution. The

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[1] *United States* v. *Heth*, 3 Cranch 399, 413; *Reynolds* v. *McArthur*, 2 Peters 417, 434; *Murray* v. *Gibson*, 15 How. 421, 423-5; *Carroll* v. *Lessee of Carroll*, 16 How. 275, 279-282; *McElvaen* v. *Dow*, 24 How. 242, 243-4; *Harvey* v. *Tyler*, 2 Wall. 328, 346-7; *Sohn* v. *Waterson*, 17 Wall. 596, 598-9; *Twenty Per Cent. Cases*, 20 Wall. 179, 187; *United States* v. *Moore*, 95 U. S. 760, 762; *Auffmordt* v. *Rasin*, 102 U. S. 620, 622; *Chew Heong* v. *United States*, 112 U. S. 536, 558-560; *Shreveport* v. *Cole*, 129 U. S. 36, 43; *United States* v. *Hees*, 159 U. S. 78, 82-7; *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, 565; *Southwestern Coal Co.* v. *McBride*, 185 U. S. 499, 503-4; *White* v. *United States*, 191 U. S. 545, 552; *United States* v. *American Sugar Co.*, 202 U. S. 563, 577; *U. S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306, 314-7; *Winfree* v. *Nor. Pac. Ry. Co.*, 227 U. S. 296, 301-2; *Summers* v. *United States*, 231 U. S. 92, 105-6; *Un. Pac. R. R.* v. *Laramie Stock Yards*, 231 U. S. 190, 199; *Cameron* v. *United States*, 231 U. S. 710, 720; *Shwab* v. *Doyle*, 258 U. S. 529, 534-7; *Fullerton Co.* v. *Northern Pacific*, 266 U. S. 435, 437; *Lindsley* v. *Peck*, 268 U. S. 238, 251-2; *United States* v. *St. Louis, etc. Ry. Co.*, 270 U. S. 1.

Government insisted (p. 186) "that the repealing act, even if the resolution created an implied contract and gave jurisdiction to the Court of Claims to enforce it, divested the Court of Claims of all jurisdiction in such controversies."

In holding to the contrary, this Court said (p. 187):

> "Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms."

In *United States* v. *St. Louis, etc., Ry. Co.*, 270 U. S. 1, carriers had causes of action against the Government for transportation charges prior to February 28, 1920. By Act of that date (41 *Stat.* 456, c. 91), amending paragraph 3, §16, of the Interstate Commerce Act, it was provided that action by a carrier for recovery of charges must be "begun within three years from the time the cause of action accrues and not after." These actions were commenced in the Court of Claims subsequent to three years from February 28, 1920. While they were pending the Act of June 7, 1924 (43 *Stat.* 633, c. 325), amended paragraph 3 by adding the following:

> "(b) The provisions of this paragraph (3) shall extend to and embrace cases in which the cause of action has heretofore accrued as well as cases in which the cause of action may hereafter accrue."

Notwithstanding the broad language in which the amendment was expressed, this Court said (p. 4):

> "It is not to be assumed that Congress intended by that amendment to defeat claims on which suits duly brought were then pending, or on which, as in the cases at bar, judgment had already been entered below."

In *White* v. *United States*, 270 U. S. 175, a suit in regard to war risk insurance was authorized by §19 of the Act of June 7, 1924 (43 *Stat.* 612, c. 320). It had been decided in a district court and was on appeal in this Court. At that stage the section was amended by the Act of March 4, 1925 (43 *Stat.* 1302 3, c. 553), so as to provide that in such cases "the circuit courts of appeal and the Court of Appeals of the District of Columbia shall respectively exercise appellate jurisdiction." Yet, it was held (p. 179) that the amendment did not include or affect the case pending in this Court.

(4) In his brief on the petition for certiorari (p. 8) respondent asserted that the application to pending causes of the Act of March 4, 1927, did not give the statute retroactive effect. No contention is made at this point with respect to the power of Congress to change the law governing the jurisdiction of the District Court for Porto Rico in such causes. The only concern at the moment is to ascertain what Congress designed to accomplish. Whether therefore the statute was retrospective depends upon the meaning of the word "retrospective." Fortunately, this Court has defined it.

In *Calder* v. *Bull*, 3 Dall. 386, 391, it was said:

> "Every *ex posto facto law* must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: The former, only, are prohibited. Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective."

So in *Poole* v. *Fleeger*, 11 Peters 185, 198, it was said:

> "What is meant by a retrospective law? It is one which changes, or injuriously affects a present right; by going behind it, and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued."

Mr. Justice Story, in *Society, etc.*, v. *Wheeler*, 2 Gall. 105, 139; 22 Fed. Cases No. 13,156, pages 756, 767, said:

> "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

Within this Court's own use of the word—by force of the very definition laid down—operation would obviously be retrospective if the statute were held to defeat further prosecution of suits in existence when it became law. In bringing their actions taxpayers were availing of rights assured them by existing law. The method by which they sought enforcement of those rights was then equally sanctioned by existing law. As elsewhere pointed out, they have lodged in court hundreds of thousands of dollars to await the outcome of the litigation. They are entitled to have that money back if the tax statutes be invalid. To say that attributing to the statute a purpose to destroy the suits and leave the taxpayers hanging helpless in the air would give it no retrospective effect would be absurd.

(5) Aside from the protection of the taxpayers arising from construing the statute in obedience to the prevailing presumption, there is nothing in the general situation, or in the apparent purpose, or in the language, to indicate an intention by Congress to apply it to cases

brought before the date of its enactment. Nor was anything said in Congress, during the consideration of the bill from which it resulted (*Congressional Record*, 69th Congress, 2nd Session, p. 5052), to reveal an expectation that such cases would be swept away by the measure.

In addition, perhaps it will be conceded, and indisputably it is true, that the word "maintain" is at least of ambiguous import. As applied to legal actions it may mean support, hold or continue; it may mean commence, institute or begin (*Boutiller* v. *The Steamboat Milwaukee*, 8 Minn. 97, 105; *Smith* v. *Lyon*, 44 Conn. 175, 178; *National M. Co.* v. *Dist. Ct.*, 34 Nev. 67, 77 8). To assign it the former significance here would include all previously brought suits within, and to assign it the latter significance would exclude them from, the prohibition of the statute. Adherence to the universally prevailing rule, which this Court has adopted, requires that the Act of March 4, 1927, be construed as inapplicable to pending cases.

(6) Lastly, numerous taxpayers, relying on the declaration by the Circuit Court of Appeals (*Camunas* case, 272 Fed. 924) in 1921, that the District Court of Porto Rico had jurisdiction to enjoin the collection of taxes under void Porto Rican statutes, brought the group of suits of which the cases at bar are examples and were agreed on by counsel as fairly testing whether the tax laws of 1923 and 1925 violate the free trade clause of the Organic Act. In most of them, in compliance with the requirement of the District Court (R. 106), large sums (equal to what the taxes would have been if the statutes imposing them were valid) have been deposited by the complainants in the registry of that court (R. 148 9). It is plain that it is at least doubtful whether it would ever be possible for the depositors to repossess themselves of—and it is certain that they are without legal right to get back into their own hands—these moneys, so as to pay them under protest to the Treasurer of Porto Rico in conformity with the terms prescribed by the tax refund statute (hereafter discussed) for suing therefor at law. Ac-

cordingly, if it were now held that the Act of March 4, 1927, destroyed the jurisdiction of the District Court for Porto Rico to entertain the present cases and they were abated or dismissed, so far as concerns the accumulated sums in court the taxpayers would, or might, be wholly remediless, even though the tax statutes were later found to be invalid.

If citizens were left without remedy in that way, it would deprive them of due process of law (*DeLima* v. *Bidwell*, 182 U. S. 1, 199-0). Support of the same view is expressed in *Memphis* v. *United States*, 97 U. S. 293, 295-8; *Pritchard* v. *Norton*, 106 U. S. 124, 132; *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, 291; *Ettor* v. *Tacoma*, 228 U. S. 148, 155-6; *Ochoa* v. *Hernandez*, 230 U. S. 139, 161; *Truax* v. *Corrigan*, 257 U. S. 312, 330. Avoidance of such a consequence, or the existence even of doubt about it, is an additional reason for construing the statute so as not to interfere with pending cases (*Carey* v. *South Dakota*, 250 U. S. 118, 122; *Lewellyn* v. *Frick*, 268 U. S. 238, 251-2).

The particular cases brought to this Court were selected prior to the passage of the Act of March 4, 1927. In event the records in their present shape be deemed not full enough concerning the deposits of tax moneys in the registry of the District Court or concerning the refusal of the Court of Appeals to permit supersedeas bonds to be substituted, leave is asked to suggest diminution so as to have sent up the pertinent proof on the subject.

II

If the Act of March 4, 1927, had been in effect when the suits were commenced, it would not have deprived the District Court for Porto Rico of power to grant the relief sought.

On the hypothesis upon which we are proceeding at the moment, viz.: that the assailed statutes are invalid and the remedy at law is inadequate, it is settled by *Hill* v. *Wallace*, 259 U. S. 44, 62, that in continental United States a Federal district court could enjoin collection of the taxes if the circumstances are "extraordinary and entirely exceptional."

To the same effect are *Dodge* v. *Brady*, 240 U. S. 122, 126; *Bailey* v. *George*, 259 U. S. 16, 20; *Frayser* v. *Russell*, 3 Hughes 227, 9 Fed. Cases No. 5,067, p. 728, C. C., E. D. Va., 1878; *Acklin* v. *Peoples' Sav. Assn.*, 293 Fed. 392, 394-5, D. C., N. D. Ohio, W. D., 1923; *Lafayette Worsted Co.* v. *Page*, 6 Fed. (2d) 399, 400, D. C., D. R. I., 1925.

The District Court of the United States for Porto Rico was established by the Organic Act of 1900, known as the Foraker Act (31 *Stat.* 85, c. 191, §34). Its jurisdiction was defined by the Organic Act of 1917, known as the Jones Act (39 *Stat.* 965, c. 145, §41; *U. S. Code*, Title 48, §863), to be the same as that of the district courts of the United States. It follows that (1) if new legislation has not imposed on the Federal court in Porto Rico a limitation different from that which exists with regard to a corresponding district court in continental United States and (2) if these cases come within the class dealt with in *Hill* v. *Wallace*, then the District Court for Porto Rico had jurisdiction to restrain collection of the taxes criticised.

(1) In its scope and effect §7 of the Act of March 4, 1927, is identical in Porto Rico with R. S. §3224 in continental United States.

§3224 (*U. S. Code*, Title 26, §154; 2 *Mason*, p. 1461; *U. S. Comp. Stats.* §5947; 3 *Fed. Stat. Ann.* (2d ed.), p. 1032) is as follows:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

This provision was enacted March 2, 1867 (14 *Stat.* 475, c. 169, §10), as an amendment to the Act of July 13, 1866 (14 *Stat.* 152, c. 184, §19; *Snyder* v. *Marks* 109 U. S. 189, 191-2). It constitutes part of the revenue laws of the United States. The Revised Statutes (2d ed., 1878) carry it in Chapter Two, entitled "Of Assessments and Collections", of Title XXXV, entitled "Internal Revenue." It is therefore

to be construed in conjunction with other portions of the internal revenue laws (*Miles* v. *Johnson*, 59 Fed. 38, 40, C. C., D. Ky., 1893).

The section relates only to taxes levied by Congress (*State Railroad Tax Cases*, 92 U. S. 575, 613). It does not apply to taxes laid by any governmental subdivision—for example, the District of Columbia—exercising merely a grant of power from Congress (*R. R. and Bridge Co.* v. *District of Columbia*, 1 Mackey 217, 234-5) and hence does not apply to Porto Rico (R. 137; *Porto Rico Tax Appeals*, *supra*, p. 549).

Furthermore, §9 of the Jones Act (39 *Stat.* 954, c. 145; *U. S. Code*, Title 48, §734), prescribing what "statutory laws of the United States" shall be in force in Porto Rico, expressly excepts "the internal-revenue laws." Thereby R. S. §3224 is excluded from operation in the Island.

§7 of the Act of March 4, 1927, extends to Porto Rico, so far as concerns dealing by the Federal court there with taxes laid by the Insular laws, the exact limitation imposed by R. S. §3224 in continental United States. The phraseology of the two statutes expressing the prohibition is identical, viz.: that "no suit for the purpose of restraining the assessment or collection of any tax • • • shall be maintained." In consequence, on this branch of our inquiry the question is the same as if it had arisen in continental United States with respect to a Federal tax.

If the present suits be such that R. S. §3224 would not constitute an obstacle to their success in continental United States,—that is, if they can be classed with *Hill* v. *Wallace*,—then the Act of March 4, 1927, if it had been in force when they were instituted, would have constituted no obstacle to their being maintained in Porto Rico. If R. S. §3224 would not deprive a district court of the United States of power to enjoin collection of the taxes here involved if laid by a law of the United States, then the Act of March 4, 1927, did not deprive the District Court of the United States for Porto Rico of that power.

(2) The present suits are of the same extraordinary and exceptional type as *Hill* v. *Wallace*.

Mere lapse of time consumed in fruitless litigation until the statute of limitations has barred a remedy at law is not enough (*Graham* v. *du Pont*, 262 U. S. 234, 256). For the determination, however, of what does constitute the kind of circumstances which are sufficient to remove a case from the ban of R. S. §3224 no exact test appears to have been announced. To ascertain whether those circumstances exist here therefore the method will be followed that was used in *Hill* v. *Wallace*; that is, an analysis will be made of the statutes.

The taxes covered by Nos. 211 and 212 were laid by Porto Rican Act No. 68 of July 28, 1923 (Laws of 1923, p. 442; as amended by Act No. 1 of August 27, 1923, Laws of 1923, Special Session, p. 2, and Act No. 6 of June 23, 1924, Laws of 1924, Special Session, p. 50), and those in No. 213, by Act No. 85 of August 20, 1925 (Laws of 1925, p. 584). At the time of the accrual of the taxes the law of Porto Rico, quoted in the bills (R. 8, 65, 78), entitled a taxpayer to pay under protest and sue at law in an Insular court to recover the amount he claimed to have been wrongfully collected (Act No. 9 of June 23, 1924, Laws of 1924, Special Session, p. 80; as amended, in respects immaterial here, by Act No. 84 of August 20, 1925, p. 580).

The features of these laws (extracts from which are set out in an appendix) that, combined, make the circumstances "extraordinary and entirely exceptional" are as follows:

(a) The taxes are required to be paid by affixing and cancelling revenue stamps on the merchandise or on a document (1923 law, §§33, 37, 58; 1925 law, §35).

(b) For payment of the tax, as well as for payment of penalties for violation of the law or the regulations thereunder, a dealer must give bond in such amount as the Treasurer may require (1923 law, §53; 1925, §23).

(c) For non-payment of the tax, or for violation of any one of numerous detailed duties prescribed for taxpayers, criminal penalties, as well as summary methods of seizure of property, are provided (1923 law, §§35, 38-9, 44, 59, 74, 79, 85, 88; 1925 law, §§35, 49-52, 55, 57, 102-3).

(d) Summary detention of goods and arrests by executive officers are expressly sanctioned (1923 law, §§85, 86; 1925 law, §§55, 95).

(e) For each violation, determined by executive officials, of the statute or regulations a fine up to $25 may be assessed (1923 law, §88).

(f) Criminal punishment of officers, irrespective of participation, is attached to violations by corporations (1923 law, §80; 1925 law, §60).

(g) The sole relief is a suit under the refund statute (R. 89). In order to avail of that the taxpayer must "attach to the said suit a receipt for the tax paid under protest" or a copy of it (§6). To get the receipt he must make the payment, protest against it, procure the collector to endorse the fact of payment and the amount protested, and join the collector in signing the endorsement (§1). A suit "to secure the return of the amount protested" must be brought "within a term of not to exceed thirty days from and after the date of payment" (§4).

Not alone, as said by the court below, would a multiplicity of suits be unavoidable if attempt were made to avail of the remedy prescribed by the refund statute; but, as said in *Hill* v. *Wallace*, to carry on such burdensome litigation would be impracticable. On its face it is manifest that caring for the requisite volume of law suits would prevent a tax payer from conducting any ordinary mercantile business successfully. In two of the bills (R. 10, 67, par. 6) it is alleged that the necessary number of cases to be brought by each complainant annually would be several thousand and in the third bill (R. 80) several hundred. If that be true of three taxpayers, this Court judicially knows that court calendars in Porto Rico would become so clogged by tax refund suits that delay in judicial proceedings would be tantamount to complete denial of justice.

In the next place, the requirements of paying the tax by affixing and cancelling a stamp and of obtaining a receipt are either repugnant or are physically impossible to comply with. In the nature of things a merchant must

either purchase stamps in quantity or must at the instant he handles each article of merchandise procure the requisite amount for making the payment thereon. If he bought in quantity he could not comply with the terms of the refund statute, because there would then be no basis of protest. If he waited until the moment when he could protest in conformity with the refund statute he would require a tax official continuously at his elbow in readiness at the uncertain and unascertainable time when every transaction occurred. In the course of ordinary business therefore a merchant could never perfect an action at law which would assure recovery of a void tax which he had paid.

Moreover, viewing the scheme of the tax statutes as a whole, it is clear that the legislature has created such a stranglehold by tax officials on taxpayers that the latter would be compelled to pay the invalid taxes without recourse in order to retain their property, keep out of jail or escape ruinous fines and prevent breaches of their bonds. What is proffered as an avenue of relief is but a sham, because hedged about with insuperable difficulties.

As was said in *Graham* v. *du Pont*, at page 257, of the taxes laid on Board of Trade members dealt with in *Hill* v. *Wallace*, so it may be said with slight alteration of verbiage with respect to the taxes which Porto Rico is seeking to impose on the numerous taxpayers engaged in the cases of which those at bar are a mere sample:

> "To pay such a tax on each of the many thousands of transactions on the Board, and to sue to recover them back would have been utterly impracticable. It would have blocked the entire future grain business of the country and would have seriously injured not only the members of the Board but also the producing and consuming public."

It is urged therefore that the circumstances, lying on the face of the laws of Porto Rico, bring the instant cases within *Hill* v. *Wallace*.

Accordingly, it is concluded that the present cases are not moot. What R. S. §3224 does not require a court in continental United States to refrain from doing §7 of the Act of March 4, 1927, does not direct the District Court for Porto Rico to refrain from doing. As the present suits are of the same type that a district court of the United States would have entertained and in which it could have granted injunctions, the District Court for Porto Rico was empowered to take like action.

III.

The authorities relied on by respondent are inapplicable.

It has been frequently held that pending cases were terminated by repeal of the statutes creating the jurisdiction in course of being exercised. Examination of the precise words involved, however, will disclose that they were so different from those now under discussion that the decisions shed no light on the present controversy. Moreover, in so far as such decisions handed down by courts inferior to this contain occasional forms of adverse expression, they are opposed to what this Court, in cases previously referred to, has firmly established to be the rules governing the relation of new statutes to old cases.

In *Re Hall*, 167 U. S. 38, the Act of February 13, 1895 (28 *Stat.* 664, c. 87), authorized the Court of Claims to adjudicate certain claims against the District of Columbia. By the Act of March 3, 1897 (29 *Stat.* 669, c. 387), the Act of 1895 was repealed and it was provided that "all proceedings pending shall be vacated and no judgment heretofore rendered in pursuance of said Act shall be paid." It was said (pp. 42, 43):

> "The effect of the passage of the repealing act was to take away the jurisdiction of the Court of Claims to proceed further in those cases which were founded upon the act thus repealed. * * * The repeal of the act took away all jurisdiction in the Court of Claims

> to proceed further, so far as concerned any rights founded upon the act so repealed."

In *Hallowell* v. *Commons*, 239 U. S. 506, and *Parr* v. *Colfax*, 197 Fed. 302 (9 C. C. A., 1912), the matter involved was the transfer from the courts to an executive official of authority to deal with a particular question concerning wards of the nation. The Acts of August 15, 1894 (28 *Stat.* 305, c. 290), and February 6, 1901 (31 *Stat.* 760, c. 217), conferred on the circuit (later district) court of the United States jurisdiction to determine, and certify to the Secretary of the Interior, the heirship to an unpatented allotment held by an Indian who died intestate prior to the expiration of the period during which the land was in trust for him. By the Act of June 25, 1910 (36 *Stat.* 855, c. 431), it was provided that the Secretary of the Interior "shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive." It was said (239 U. S. 508) that the Act of 1910 made the jurisdiction of the Secretary of the Interior

> "exclusive in terms, it made no exception for pending litigation, but purported to be universal and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States. * * * the reference of the matter to the Secretary * * * takes away no substantive right but simply changes the tribunal that is to hear the case."

In *United States* v. *McCrory*, 91 Fed. 295 (5 C. C. A., 1899), *Fairchild* v. *United States*, 91 Fed. 297 (C. C., D. N. J., 1899), and *United States* v. *Kelly*, 97 Fed. 460 (9 C. C. A., 1899), the Tucker Act of March 3, 1887 (24 *Stat.* 505, c. 359, §2), conferred on circuit and district courts of the United States jurisdiction, concurrent with the Court of Claims, to entertain suits by Government officers, within certain amounts, for recovery of their salaries. The Act of

June 27, 1898 (30 *Stat.* 495, c. 503, §2), by way of amendment added a clause as follows:

> "The jurisdiction hereby conferred upon the said circuit and district courts shall not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof."

It was said or assumed in the three cases last mentioned that the amendment destroyed jurisdiction of circuit and district courts in pending suits by Government officers for the recovery of amounts claimed to be owing for salaries; that with the repeal of the statute vesting jurisdiction, and on which jurisdiction wholly depended, suits resting on the statute also fell. As matter of interpretation, the opposite result was reached in *Strong* v. *United States*, 93 Fed. 257 (C. C., Conn., 1899), and *United States* v. *Jacobus*, 96 Fed. 260 (2 C. C. A., 1899).

In *Federal Land Bank* v. *United States Nat. Bank*, 13 Fed. (2d) 36 (8 C. C. A., 1926), the jurisdiction of the district court was based solely on the land bank being incorporated under the laws of the United States. During the trial of the action the Act of February 13, 1925 (43 *Stat.* 941, c. 229, §12), was enacted providing that "no district court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress." It was held (p. 38) that the jurisdiction of the district court was ousted by this provision.

Without going further into details, it is manifest that the phraseology of the statutes passed on in the cases relied on by respondent is so variant from the language of the statute under consideration in the present cases that the decisions cited by him do not support an interpretation of the Act of March 4, 1927, contrary to that urged by petitioners and do not even bear on the matter.

Here the provisions of the Judicial Code defining the powers of the District Court for Porto Rico remain in full force. There has been no attempt to amend them. The amendatory statute must be construed in conjunction with them. The situation therefore is completely distinguishable from one where there was plain purpose to alter the jurisdiction constituting the very life of the litigation concerned.

IV.

The present cases are not moot and petitioners request opportunity to be heard on their merits.

Dated, August 4, 1927.

Respectfully submitted,

FRANCIS G. CAFFEY,
Counsel for Petitioners.

APPENDIX.

A.

Extracts from Porto Rican tax statute of 1923.

[Act No. 68 of July 28, 1923, Laws of 1923, p. 442; as amended by Act No. 1 of August 27, 1923, Laws of 1923, Special Session, p. 2.]

Section 20.—That there shall be levied, collected and paid, for one time only, as an internal-revenue tax on each of the following articles: • • •

18. *Motor vehicles.*—On every motor vehicle, automobile, motorcycle, aeroplane, hydroplane, dirigible, side-car for motorcycles, motor for automobiles, bicycle, launch, auto-truck, chassis, auto-wagon, auto-tractor, parts and accessories for all of the aforesaid articles, solid or pneumatic tires, inner tubes therefor,—excluding tools, screws, tube-valves, spark-plugs and light bulbs, piston rings, felt washers, steel ball-bearings, lamp lenses, radiator rubber tubes, clamps therefor, vibrators and tire tube patches,—produced, manufactured, sold or used in Porto Rico, a tax of ten (10) per cent *ad valorem*.

Section 33.—The tax hereby prescribed on articles for sale, use, consumption or exhibition in Porto Rico, except as provided in section 29 of this Act, shall be levied as soon as they are on the market in possession of a dealer or commission merchant or the representative thereof in this island, who shall be responsible for the payment of said taxes upon transferring said articles to another dealer or consumer, or *upon acquiring them or having them in his possession*, and who shall pay such taxes *in one of the two following forms in accordance with such regulations as the Treasurer of Porto Rico may prescribe for the purpose*: (a) Upon acquiring the taxable articles and having them in his possession, by making entries of receipt and delivery in the stock and receipt and delivery book, and by simultaneously paying the tax by cancelling the corresponding stamps on

an internal revenue invoice; or (*b*) as he disposes of the taxable articles. * * *

Section 35.—* * * From and after the date on which this Act take effect, every person, who by himself or through his agents or representatives, acquires taxable articles for sale or transfer to another merchant or consumer, and on which the taxes specified by this Act have not been paid, shall keep in his commercial establishment, from which it shall not be removed, except by authorization of the Treasurer of Porto Rico, an official book wherein entries shall be made of all taxable articles at the time they are acquired, and the corresponding entry at time of selling or otherwise disposing of them, and, further, furnish all other information that the Treasurer of Porto Rico may by regulation prescribe for the purpose of determining the value and other circumstances in connection with such articles; * * *

Section 37.—That all taxes provided for in this Act shall be paid by affixing and cancelling internal-revenue stamps on such documents and articles, as for such purpose the Treasurer of Porto Rico may prescribe. Such stamps shall be furnished by the Treasurer of Porto Rico, on requisition, to collectors, in such quantities as may be necessary for local needs.

Section 38.—That every person who fails to pay the taxes herein prescribed, at such time and in such manner as this Act provides, except as otherwise herein determined, shall be guilty of misdemeanor, and the merchandise on which said tax has not been paid may be attached by the Treasurer of Porto Rico or by his agents and by him sold at public auction to indemnify The People of Porto Rico for the sums defrauded by the violator.

Section 39.—That every person who shall have in his possession or has on any premises under his control, any merchandise subject to tax under the provisions of this Act, on which such tax has not been paid, except such as are duly entered in the official book of a licensed manufacturer, or of a dealer, shall be guilty of misdemeanor, and the merchandise may be seized by the Treasurer of Porto Rico or by his

agents, and by him sold at public auction to indemnify The People of Porto Rico for the amounts defrauded by the violator, and the license of such person, if a merchant, may be revoked.

Section 44.—That it shall be the duty of every merchant, agent or other person possessing in Porto Rico any merchandise taxable under the provisions of this Act, to produce upon demand of any duly authorized internal-revenue officer, true and authentic invoices covering such merchandise. Any merchant, agent or other person who makes or causes payment to be made of any tax not in accordance with the true value of the merchandise subject to tax under the provisions of this Act, shall be guilty of misdemeanor, and the Treasurer of Porto Rico may attach and sell at public auction the merchandise on which the full amount of the tax has not been paid, to indemnify The People of Porto Rico for the amounts defrauded by the violator.

Section 53.—* * * Every dealer having taxable articles in his possession upon which taxes have not been paid, shall provide a bond for the amount that the Treasurer of Porto Rico may require. The amount of this bond shall be fixed according to volume of business done. Said bond shall be liable for such taxes and fines as may be imposed on said manufacturers for violations of any of the provisions of this Act or of the regulations. * * *

Section 58.—That all merchandise acquired or manufactured during a natural day, and the corresponding internal revenue stamps, shall be entered in the stock book at the precise moment of receipt or completion of said merchandise, if the nature of the article permits, or at the termination of the natural working day in other cases. There shall further be entered in said book each sale or shipment made during said day, including the name and address of the buyer or receiver when referring to manufacturer, and the stamps cancelled, said entry to be made before removing the merchandise from the factory or premises, and such other information as the Treasurer of Porto Rico may by regulation prescribe. * * * In the invoice books the payment of

tax shall be made by affixing and cancelling internal-revenue stamps, in such cases as may be necessary in accordance with the regulations prescribed by the Treasurer of Porto Rico.

Section 59.—That the commercial invoice and stock-books shall at all times be accessible to inspection by internal-revenue officers. Every person who fails to comply with any of the provisions of this Act regarding the aforesaid books, shall be guilty of misdemeanor, and the unregistered product shall be seized by the Treasurer of Porto Rico or by his agents, and by him sold for the benefit of The People of Porto Rico.

Section 74.—That when no other penalty is specifically provided, every person who violates or fails to observe any of the provisions of this Act or of any act relating to internal revenues, or of such regulations, as may be promulgated by virtue thereof, and every person who knowingly aids, abets, or otherwise assists another in violating or failing to observe any of the provisions of this Act or of any other act or regulation relating to the revenues of Porto Rico, shall be guilty of misdemeanor.

Section 79.—That whenever this Act provides that the commission of certain acts constitutes a misdemeanor and no penalty is specifically prescribed, the accused shall be sentenced to a fine of from fifty (50) to five hundred (500) dollars, or to confinement in jail for a maximum term of one year, and for the second and each subsequent offense both penalties, fine and imprisonment, shall be imposed.

Section 80.—That whenever a violation of any of the provisions of this Act is committed by a corporation, the warrant of arrest shall be issued for and served upon the president, manager, administrator or other officer of the corporation designated by the court and said officer, upon conviction of the corporation, shall be liable to and shall suffer such penalty as this Act establishes for such violation.

Section 85.—That any duly authorized internal-revenue agent, collector or officer may detail and examine any cask, bundle, package or box of any description containing or

supposed to contain taxable articles whenever such officer shall have reason to believe that the tax imposed by law thereon has not been paid, or that said bundle is being removed in violation of law, and he may further hold such casks, bundles, packages or boxes until it shall have been determined whether the property so detained is subject to taxation under the law.

Section 86.—That the Chief of the Bureau of Excise Taxes or his assistant and all internal revenue agents are hereby authorized to arrest any offender caught in the act of committing a violation of the revenue laws or regulations, and immediately to conduct such offender before the municipal or other competent judge for the preparation of summary or other preliminary proceedings in the case, and the accused shall remain under arrest during such preparation and preliminary proceedings; and should the existence of good and sufficient proof of the imputed violation of the law be shown in the course of this investigation, said commitment shall continue until the case shall have been decided by a court having jurisdiction thereof. The summary proceedings and the final trial of the case shall be held without unnecessary delay. If the guilt of the accused is not conclusively established by the summary proceedings he shall be immediately set at liberty. During all the time of the prosecution of the summary proceedings or thereafter until such time as a final decision shall have been reached in the case the accused shall be allowed to furnish bail the amount of which shall not exceed the maximum of the penalty which, in accordance with law, attaches to the violation of which he is accused, the number of days of imprisonment computed at the rate of three (3) dollars a day to be added to the amount of the fine; but no person against whom conclusive evidence of guilt is adduced at such summary proceedings shall be set free until such time as the amount and the form of the bond and the sufficiency of the sureties thereon shall have been approved. In all cases where complaint is filed in a competent court against an accused person for violating the provisions of this Act or the regulations there-

of, before proceeding to try the case the judges shall submit the proceedings to the Treasurer of Porto Rico, through the office of the Attorney General, for the purpose of giving the accused an opportunity of being tried administratively should said procedure be proper in the judgment of the Treasurer.

Section 88.—That the Treasurer of Porto Rico is hereby authorized to impose and collect, through administrative proceedings, from any person failing to observe any of said regulations, and in cases of less serious violations of this Act, a fine not to exceed twenty five (25) dollars for each violation, or he may in his discretion file a complaint in the proper court against such person for offenses against the regulations or violations of the law. Any person so complained against before a court for any violation of this Act or of the regulations, upon conviction, shall be punished by fine or imprisonment, or by both penalties, in accordance with the specific provisions hereof. Whenever the Treasurer of Porto Rico imposes an administrative fine as hereinbefore provided and payment thereof is not made, said officer may institute proceedings in the proper court for violation of the provisions of law or of the regulations under which such fine is imposed, and upon conviction, the person committing such violation shall be punished according to the provisions of this Act as if the proceedings had been originally instituted in the proper court.

B.

Extracts from Porto Rican tax statute of 1925.

[Act No. 85 of August 20, 1925, Laws of 1925, p. 584.]

Section 16.—There shall be collected and paid once only, an internal revenue tax on each of the following articles: * * *

15. *Motor Vehicles.*—On every motor vehicle such as automobiles, trucks, tractors, autocars and trailers, by whatever name known; on chassis, motors, bodies, inner tubes and solid or pneumatic tires for such vehicles; on motorcycles and launches, with or without mounted motors; on motors for the same, and on solid or pneumatic tires for

motorcycles, sold, transferred, used or consumed in Porto Rico, a tax of seven (7) per cent *ad valorem*.

Section 23.— * * * Every dealer having taxable articles in his possession upon which taxes have not been paid, shall furnish a bond in favor of The People of Porto Rico in such amount as the Treasurer of Porto Rico may require. The amount of this bond shall be fixed according to the volume of the business done. Said bond shall be liable for all taxes and fines that may be imposed upon him for violation of any of the provisions of this Act or of the regulations; * * *

Section 35.—That all excise taxes provided for in this Act shall be paid by affixing and cancelling internal revenue stamps on such documents and articles, as for such purpose the Treasurer of Porto Rico may prescribe. Such stamps shall be furnished by the Treasurer of Porto Rico to collectors of internal revenue in such quantities as may be necessary for local needs; * * *

Section 49.—Any person who, for the purpose of payment of the taxes prescribed by this Act, shall for any reason declare smaller quantities than those produced, manufactured, obtained or deducted, shall be guilty of a misdemeanor.

Section 50.—Any person who shall sell, transfer, use or consume any article subject to taxation under this Act, without paying the said tax at the time and in the manner herein provided, shall be guilty of a misdemeanor.

Section 51.—Any person who deals in, handles, has in store, or shall have had merchandise taxable under this Act, and refuses to furnish or prevents the furnishing of documents or reports in connection therewith to the Treasurer of Porto Rico or to his agents, when required by them, shall be guilty of a misdemeanor.

Section 52.—Any person who sells or disposes of taxable articles or removes them from a factory without having paid the tax thereon in the manner specified in the preceding section, except as the Treasurer of Porto Rico may by regulation prescribe, shall be guilty of a misdemeanor.

Section 55.—The absence of the proper internal revenue stamp on any box or package of cigars, cigarettes or any other article on which the law or the regulations require the affixing of internal revenue stamps as evidence of the payment of the tax, shall constitute prima facie evidence of the non-payment of the tax, and all articles lacking the proper internal revenue stamps shall be seized by the Treasurer of Porto Rico or by his agents, and by him sold for the benefit of The People of Porto Rico.

Section 57.—Any person who violates or fails to comply with any of the provisions of this Act, or with any law relative to internal revenue, or with any provision of such regulations as may be promulgated thereunder; and any person who knowingly aids, abets or otherwise helps another to violate this Act, or to fail to comply with any of its provisions or with any other law or regulation thereunder relative to the internal revenue of Porto Rico, where no other penalty is specifically provided, shall be guilty of a misdemeanor.

Section 60.—Whenever a violation of any of the provisions of this Act is committed by a corporation, the warrant of arrest shall be issued for and served upon the president, manager, administrator or other officer of the corporation designated by the court as liable under the law, and said officer, upon conviction of the corporation, shall be liable to and shall suffer such penalty as this Act establishes for such violation.

Section 95.—The Chief of the Bureau of Excise Taxes, the Assistant Chief and the General Collector of Internal Revenues of the said bureau and all agents and collectors of internal revenue are hereby authorized to take oaths, certify declarations, inspect stocks of merchandise of manufacturers or dealers in order to ascertain the amount of his stock in connection with this Act, and to arrest any offender caught in the act of committing a violation of the revenue laws or regulations, and immediately to conduct such offender before the municipal or other competent judge for the preparation of summary or other preliminary proceedings in

the case, and the accused shall remain under arrest during such preparation and preliminary proceedings; and should the assistance of good and sufficient proof of the imputed violation of the law be shown in the course of this investigation, said commitment shall continue until the case shall have been decided by a court having jurisdiction thereof. The summary proceedings and the final trial of the case shall be held without unnecessary delay. If the guilt of the accused is not conclusively established by the summary proceedings, he shall be immediately set at liberty. During all the time of the prosecution of the summary proceedings or thereafter until such time as a final decision shall have been reached in the case, the accused shall be allowed to furnish bail, the amount of which shall not exceed the maximum of the penalty which, in accordance with law, attaches to the violation of which he is accused, the number of days of imprisonment computed at the rate of three (3) dollars a day to be added to the amount of the fine; but no person against whom conclusive evidence of guilt is adduced at such summary proceedings shall be set free until such time as the amount and form of the bond and the sufficiency of the sureties thereon shall have been approved. In all cases where complaint is filed in a competent court against an accused person for violating the provisions of this Act or the regulations thereof, before proceeding to try the case, the judges shall submit the summary proceedings to the Treasurer of Porto Rico, through the office of the Attorney General, for the purpose of giving the accused an opportunity of being tried administratively should said procedure be proper in the judgment of the Treasurer.

Section 102.—When no other penalty is specifically provided, every person who violates or fails to observe any of the provisions of this Act or of such regulations as may be promulgated by virtue hereof, and every person who knowingly aids, abets, or otherwise assists another in violating or in failing to observe any of the provisions of this Act or of any other act or regulation relating to the revenues of Porto Rico, shall be guilty of a misdemeanor

Section 103.—Whenever this Act provides that the commission of certain acts constitutes a misdemeanor and no penalty is specifically prescribed the accused shall be sentenced to a fine of not less than one hundred (100) nor more than one thousand (1,000) dollars or to confinement in jail for a term of not less than thirty (30) days or more than one year, and for the second and each subsequent offense, both penalties, fine and imprisonment, shall be imposed.

Supreme Court of the United States

OCTOBER TERM, 1927

No. 214

ADOLFO VALDES, PIO PEREZ, LUIS C. CUYAR, *et al.*, etc.,

Petitioners,

vs.

JUAN G. GALLARDO,

Treasurer of Porto Rico.

No. 215

FINLAY, WAYMOUTH & LEE, INC.,

Petitioners,

vs.

JUAN G. GALLARDO,

Treasurer of Porto Rico.

No. 216

ANGEL ABARCA PORTILLA, RAFAEL ABARCA PORTILLA, ENRIQUE ABARCA SANFELIZ, *et al.*, etc.,

Petitioners,

vs.

JUAN G. GALLARDO,

Treasurer of Porto Rico.

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONERS

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CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONERS.

The order granting the writs of certiorari herein directs that the cases be set down for argument

"on the sole question whether they have become moot by virtue of the Act of March 4, 1927, amending section 48 of the Organic Act of Porto Rico."

This brief consequently is confined to that question and does not discuss the merits.

The opinions of the court below are reported as *Porto Rico Tax Appeals*, 16 Fed. 2d, 545; but as they were delivered before the Act of March 4, 1927, was passed, they of course do not discuss the question now to be argued.

The cases originated as bills in equity in the District Court of the United States for Porto Rico to enjoin respondent from enforcing an act of the legislature of Porto Rico which imposed certain *excise* and *sales* taxes.*

The chronology of the cases is important.

The bills were filed in October and November, 1925 (R. 1, 70, 88). They were dismissed by the District Court in January, 1926 (R. 62, 80, 104). Appeals to the Circuit Court of Appeals were taken during the same month (R. 64, 81, 111, 112). The transcripts of record were filed in the Circuit Court of Appeals in February, 1926 (R. 1, 70, 88). The appeals were argued April 27, 28, 1926 (R. 139). Decrees of affirmance, upon the ground that there was an adequate remedy at law by paying the taxes under protest and then suing at law for their recovery, were entered on September 25, 1926 (R. 118-124, 139). A petition for rehearing, filed October 14, 1926, called attention to the fact that the bills had been filed in reliance upon a previous decision of the same court (*Camunas Case*, 272 Fed. 924) holding the remedy at law inadequate and that by such

*Act No. 85 of August 20, 1925, approved by the Governor of Porto Rico on that day and entitled "An Act to Provide Revenues for the People of Porto Rico by Levying Certain Sale Taxes and Taxes for the Manufacture, Use, Sale and Consumption of Certain Products, and by the Levying of Certain Excise and License Taxes on Certain Occupations, Industries or Businesses, To Impose Certain Penalties, To Repeal the Laws in Force Providing for Excise and License Taxes and for Other Purposes."

reliance plaintiffs possibly had lost whatever legal remedy they may have had (R. 124-136, particularly 134, 135). Reargument was ordered November 4, 1926, and reargument was had November 30 and December 1, 1926 (R. 139). Upon the reargument the ruling as to the adequacy of the remedy at law was reversed, the legal remedy was declared inadequate, the validity of the tax statute was considered upon its merits, and it was partly sustained and held partly invalid (R. 136-138). That decision was rendered January 7, 1927 (R. 140, 141). Motions to stay the mandates pending determination by this court of a petition for certiorari were made and granted January 28, 1927 (R. 141, 142).

Congress then passed the Act of March 4, 1927, Section 7 of which amended Section 48 of the Organic Act of Porto Rico by adding thereto the following (44 Stat. 1418, c. 503, § 7; U. S. Code, Title 48, Sec. 872, Pamphlet Supplement No. 3, April, 1927, p. 92):

> "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico."

Whether or not that statute renders these cases moot and prevents a review of them by this court is the question now presented.

POINT I.

The new statute is inapplicable to pending cases.

1. This precise point, with reference to this very statute, has been specifically decided by the Circuit Court of Appeals for the First Circuit.

The case of *Gallardo* v. *Porto Rico Ry. L. & P. Co.*, 18

Fed. (2d) 918, was brought in the District Court of the United States for Porto Rico and was pending in the Circuit Court of Appeals at the time the Act of March 4, 1927 was passed. A motion was then made in the Circuit Court of Appeals to dismiss that case (and several others similarly situated) upon the ground that further prosecution of the cases was prevented by the Act of March 4, 1927. In denying that motion the Circuit Court of Appeals said (18 Fed. (2d) at p. 925):

> "It is contended that this act destroys the jurisdiction otherwise inherent in the court below and in this court. We are unable to adopt that view. The interpretation of this act falls under the general rule recently stated by the Supreme Court in Fullerton v. Northern Pacific R. Co., 266 U. S. 435, 437, 45 S. Ct. 143, 144 (69 L. Ed. 367), as follows:
>
> 'It is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect'—citing Harvey v. Tyler, 2 Wall. 328, 347, 17 L. Ed. 871; Sohn v. Waterson, 17 Wall. 596, 599, 21 L. Ed. 737; Twenty Per Cent. Cases, 20 Wall. 179, 187, 22 L. Ed. 339; Chew Heong v. United States, 112 U. S. 536, 559, 5 S. Ct. 255, 28 L. Ed. 770; Schwab v. Doyle, 258 U. S. 529, 534, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454; Hopkins v. Lincoln Trust Co., 233 N. Y. 213, 135 N. E. 267.
>
> *We see nothing in this amendment indicating that Congress intended to apply it to pending cases. Nor do we think that the word 'maintained' is to be construed to cover actions already instituted.* Similar language has been held inapplicable to pending suits. Moon v. Durden, 2 W., H. & G. (Exch.) 21 (1848); Knight v. Lee (1893) 1 Q. B. D. 41; Burbank v. Inhabitants of Auburn (1860) 31 Me. 580; Gumpper v. Waterbury Traction Co. (1896) 68 Conn. 424, 36 A. 806; Smith v. Lyon (1876) 44 Conn. 175."

2. Similar decisions repeatedly have been made with reference to similar statutes.

In *Moon* v. *Durden*, 2 Exch. 22 (1848), a statute which provided that "no suit shall be *brought or maintained* in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager" was held inapplicable to cases pending at the time of the enactment of the statute. ALDERSON, *B.*, said (p. 41):

> "If it had been stated 'that no action shall be brought,' *or only 'that no action shall be maintained,'* it seems to me clear that we should have considered the words 'brought' and 'maintained' as synonymous, *and as prohibiting the success of future suits alone.* And although the use of both in one sentence makes this *less obvious*, yet, when we consider that to give the more strict interpretation to the word 'maintained' will compel us to suppose, without further evidence, that the legislature contemplated so gross an act of injustice as, without compensation, to take away an existing right of action already pending, *and that, too with no provision even for the costs incurred in the enforcing of what was, before the act, a legal right,* I am not disposed to put such a construction on the word, but to treat it, as I think the legislature intended it, as a redundant expression only."

That case was cited and followed in *Grasso* v. *Holbrook &c. Co.*, 102 N. Y. App. Div. 49, 52.

Knight v. *Lee*, 1 Q. B. 41 (1893), is to the same effect.

In *Burbank* v. *Inhabitants of Auburn*, 31 Me. 590, a statute providing that "no action shall hereafter be maintained against any city," &c., was held inapplicable to pending cases, the word "maintained" being considered to have the import of *brought*.

A similar decision was made in *Smith* v. *Lyon*, 44 Conn. 175, 178, in which the court said:

> "Nor are we willing to overthrow a rule so firmly founded in justice upon the plaintiff's suggestion as to the word 'maintained'; for we do not think that, as used in the act, it in itself imports retroactive intent on the part of the legislature. A critical analysis of it would doubtless disclose the idea of continuing a life already commenced; *but men both in and out of the profession often speak of maintaining an action, having reference to one yet to be instituted.*"

So, too, in *Creditors' Adjustment Co.* v. *Rossi*, 26 Cal. App. 725, a prohibition against the maintenance of an action was held not to apply to cases brought before the enactment of the prohibition. The court said:

> "The word 'maintain' as here used means to commence, institute, begin, or bring."

3. The decision of this court in *United States* vs. *St. Louis, San Francisco & Texas Ry. Co.*, 270 U. S. 1, is practically conclusive in showing that the statute here involved does not apply to pending cases.

It was there held that a statute providing that "all actions at law" by carriers for the recovery of their charges should be begun within three years from the time the cause of action accrued, was not applicable to cases brought upon causes of action which accrued prior to the enactment of the statute. It was held, also, that a further statute enacting that the provisions of the prior one should "extend to and embrace" cases in which the cause of action had theretofore accrued, *was not applicable to suits already brought.* The court said (page 4):

> "It is not to be assumed that Congress intended by that amendment to defeat claims on which suits duly brought were then pending, or on which, as in the cases at bar, judgment had already been entered below."

It is to be observed that the two statutes there involved, when read together, provided, in substance, that "all actions" of the nature specified in the statute should be begun within three years whether the cause of action had or had not accrued; and yet, notwithstanding the generality of the phrase "all actions" the court held that pending actions should be excluded.

It is impossible, we think, to distinguish that case from those at bar, and from the decision there made it necessarily follows that these cases are not affected by the statute which respondent invokes.

4. Furthermore, U. S. Rev. Stat. Sec. 13 (U. S. Code, Title 1, Sec. 29), is in the nature of a saving clause, if one be needed, preventing the application of the amendment to pending cases. That section provides:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute *shall be treated as still remaining in force* for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

That section, it has been decided, is not confined to penal statutes, and has been upheld and enforced "as a rule of construction applicable, when not otherwise provided, as a general saving clause to be read and construed as a part of all subsequent repealing statutes." (*Hertz* v. *Woodman*, 218 U. S. 205, 217, 218.)

If respondent were liable to an injunction under the law as it stood prior to March 4, 1927, the then-existing law is to be treated "as still remaining in force for the purpose of sustaining any proper action * * * for the enforcement of such * * * liability".

POINT II.

To construe the statute as applicable to cases brought prior to its enactment would violate the rule that all statutes are to be considered as prospective only.

The rule that statutes are not to be given retroactive effect is well settled.

> "That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of *general application. It has been applied by this Court to statutes governing procedure* • • •."
>
> *United States* v. *St. Louis, etc. Ry. Co.*, 270 U. S. 1, 3.

> "It is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."
>
> *Fullerton Co.* v. *Northern Pacific Ry. Co.*, 266 U. S. 435, 437.

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, *and it ought never to receive such a construction if it is susceptible of any other.* It ought not to receive such a construction unless the words used are so clear, strong and imperative that *no other meaning can be annexed to them* or unless the intention of the legislature cannot be otherwise satisfied."
>
> *U. S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306, 314.

"Courts of justice agree that *no statute, however positive in its terms,* is to be construed as designed to interfere with existing contracts, *rights of actions,* or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes *only to future cases,* unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. *Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise,* unless the language employed expresses a contrary intention in unequivocal terms."

Twenty Per Cent. Cases, 20 Wall. 179, 187.

Indeed, the existence of that rule, *and that the statute here under consideration is not to be construed as retroactive,* seem to be expressly admitted by the respondent; for in his brief in opposition to the petition in Nos. 211, 212, 213, the respondent said:

"We are thoroughly in accord with counsel for the petitioners on the elementary doctrine as to the present and prospective effect in general of statutes.

We have never believed or asserted that the Act of March 4, 1927, is retroactive. Indeed, we do not see how that act does or could have any retroactive effect."

Respondent's position seems to be that to apply the statute to pending cases *would not be giving it a retroactive effect.* That, we submit, is untenable and unsound, and, indeed, utterly absurd.

Petitioners had a right to sue in equity to enjoin the enforcement of the Tax Act as the law existed when they brought their suits. That, at least, is their contention and the result of the decision below in these cases. It is true that respondent denies that that was the existing law, but the court below has ruled against him on that point; and the question whether these cases have become moot "*by virtue of the Act of March 4, 1927*," necessarily must be determined upon the assumption that the previously existing law authorizes the issuance of injunctions.

The fact that respondent claims that the Act of March 4, 1927, has rendered these cases moot is the clearest sort of demonstration that he is attempting to give to the new statute a retroactive effect, *i. e.*, he asserts that the new statute deprives petitioners of a remedy which the old law gave them. If that were not so he would be resisting the cases upon the basis of the old law instead of invoking the aid of the new law.

A law which stops the prosecution of a suit which the old law gave a right to prosecute certainly is retroactive; and to give that effect to a new law is to give it a retroactive effect.

> *U. S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306, 316.

Furthermore, it is to be remembered that in two of these cases (Nos. 214 and 215, which were Nos. 1944 and 1949 in the court below) it has been decided that petitioners *are entitled to injunctions against the collection of taxes on sales in the original packages by the importers of foreign goods, and are entitled to repayment of the impounded proceeds of such taxes* (R. 138, 140). Consequently, to sustain respondent's contention that the new act prevents the issuance of such injunction by the District Court pursuant to the mandate of the Circuit Court of Appeals (which con-

tention is clearly made at pages 8 and 9 of his brief in opposition to the petition in Nos. 211, 212 and 213) would amount to giving to the Act of March 4, 1927, not only a retroactive effect, but the effect of vacating and annulling a judgment duly rendered by a competent court before the statute was enacted. Certainly that is retroactiveness with a vengeance.

In short, respondent's assertion that to construe the statute as rendering these cases moot is not to give to them a retroactive effect is manifestly absurd.

POINT III.

Even if the new statute be applicable to cases pending in the District Court, it certainly does not affect cases already determined in the District Court or affect the jurisdiction of this court to review decrees previously made by the Circuit Court of Appeals.

The new statute does *not* amend Section 41 of the Organic Act, which is the section that prescribes the jurisdiction of the District Court (39 Stat. 965; U. S. Code, Tit. 48, § 863). It does not amend Section 128 of the Judicial Code (U. S. Code, Title 28, Sec. 225), giving the Circuit Court of Appeals appellate jurisdiction to review final decisions of the District Court for Porto Rico. Neither does it amend Section 240 of the Judicial Code (U. S. Code, Title 28, Sec. 347), giving this court jurisdiction to review decisions of the Circuit Court of Appeals. *The appellate jurisdiction there prescribed remains unchanged.*

While an appeal, unlike a writ of error, may not be technically the institution of a new suit, the perfecting of the appeal transfers the case from the trial court to the

appellate court (*Keyser* v. *Farr*, 105 U. S. 265; *Morrin* v. *Lawler*, 91 Fed. 693).

Consequently, the prosecution of an appeal or writ of certiorari cannot be regarded as the maintenance of a suit in the trial court.

Neither appeals nor writs of error ordinarily are regarded as within the purview of statutes affecting "actions" or "suits."

3 *Corpus Juris*, pp. 305, 330.

In short, therefore, a statute which prohibits the maintenance of a certain class of suits in the District Court of the United States for Porto Rico does not prohibit the prosecution of appeals or of writs of certiorari in this court.

Neither does such a statute prohibit the District Court from giving effect to a judgment or decree of the Circuit Court of Appeals or of this court.

In *White* v. *United States*, 270 U. S. 175, the appeal to this court was taken in August, 1924, and on March 4, 1925, an act was passed giving appellate jurisdiction over cases of the kind there involved to the Circuit Court of Appeals instead of this court. Nevertheless, this court retained jurisdiction and heard and decided the case in 1926. The court said (p. 179):

> "Mrs. White appealed to this court in August, 1924, and it fairly may be assumed that the Act of March 4, 1925, c. 553; 43 Stat. 1302, 1303, giving the appellate jurisdiction to the Circuit Court of Appeals does not apply."

It is interesting to note that in that case the United States conceded that the Act of March 4, 1925, was *prospective only and did not affect pending cases* (See abstract of Government's brief in that case at p. 177).

POINT IV.

These cases come within the doctrine of Hill v. Wallace, 259 U. S. 44, and hence the Act of March 4, 1927, does not prevent their maintenance even if that statute be construed as applicable to suits brought prior to its enactment.

The Act of March 4, 1927, is identical in substance and effect with U. S. Rev. Stat. Sec. 3224 (U. S. Code, Title 26, sec. 154), which reads as follows:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

That is to say, the Act of March 4, 1927, prevents the maintenance of suits to enjoin the assessment or collection of taxes imposed by the laws of Porto Rico under the same circumstances, *and under the same circumstances only*, as U. S. Rev. Stat. Sec. 3224 prevents the maintenance of such suits with respect to taxes imposed by the laws of the United States. If Sec. 3224 would not prevent the maintenance of these suits if the taxes involved were imposed by the United States, then the Act of March 4, 1927, does not prevent their maintenance even if construed as applicable to pending cases.

If, then, these taxes had been imposed by the United States, would Sec. 3224 prevent the maintenance of these suits? We submit not.

In *Hill* v. *Wallace*, 259 U. S. 44, the suit was against the Secretary of Agriculture, the Collector and Commissioner of Internal Revenue, and the United States District Attorney, and prayed for an injunction restraining the collection of a tax imposed by Congress upon certain contracts for the sale of grain. Section 3224 was specially set up and in-

voked (p. 49) and yet the injunction against the Collector and District Attorney was granted (p. 72). With respect to Section 3224 this court said (p. 62):

> "A further question arises as to whether this is a suit for an injunction against the collection of the tax in violation of § 3224, Rev. Stats., in so far as it seeks relief against the District Attorney and Collector of Internal Revenue. Were this a state act, injunction would certainly issue against such officers under the decisions in *Ex parte Young*, 209 U. S. 123; *Ohio Tax Cases*, 232 U. S. 576, 587; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 82. Does § 3224, Rev. Stats., prevent the application of similar principles to a federal taxing act? It has been held by this court, in *Dodge* v. *Brady*, 240 U. S. 122, 126, that § 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also *Dodge* v. *Osborn*, 240 U. S. 118, 122. In the case before us, a sale of grain for future delivery without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back would necessitate a multiplicity of suits and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market in order to test the validity of the act would stop its 1600 members in a branch of their business most important to themselves and to the country. We think these exceptional and extraordinary circumstances with respect to the operation of this act make § 3224 inapplicable."

The cases at bar, we submit, fall clearly within that doctrine.

We have here a tax on *sales*, just as in *Hill* v. *Wallace*, with the additional element that the tax is not confined to sales of any one kind of merchandise but applies to all "articles the object of commerce" except some which are specifically exempted. The rate of the tax varies on different articles (See Sections 16 and 62 quoted in appendix). Any person who sells any article subject to the tax without paying the tax is guilty of a misdemeanor (Secs. 50, 79), the penalty for which is a fine of not less than $100 nor more than $1000 or confinement in jail for not less than 30 days nor more than one year, and for the "second and each subsequent offense, both penalties, fine and imprisonment, shall be imposed" (Sec. 103). Thus here, as in *Hill* v. *Wallace*, a sale without paying the tax "will subject one to heavy criminal penalties." Petitioners are merchants having established businesses and deal in a large number of articles and have an enormous number of separate sales (R. 19, 25-37, 40-42, 71, 106-110); and it can be said here, with even greater force than it was said in *Hill* v. *Wallace*, that to pay the tax on each of the many daily transactions which occur in the ordinary business of these merchants and then sue to recover it back would necessitate a multiplicity of suits and would be impracticable. Moreover, the statute affects not only these petitioners but a large number of other merchants in Porto Rico; and it is easy to see that if all these merchants paid their taxes on each of their sales and then sued to recover them, the courts in Porto Rico would be clogged with such a tremendous mass of such suits that the space of a generation would not suffice to try them all. To make the sales without paying the taxes is impossible (unless protected by injunction) because the penalties are so heavy that one day's business would entail fines sufficient to bankrupt any merchant or send him to jail for the rest of his life.

Enough has been said, therefore, to demonstrate that

the circumstances here are fully as extraordinary and exceptional as in *Hill* v. *Wallace*.

But there is much more than should be noted in emphasis of the exceedingly extraordinary situation here presented.

Every person who engages or attempts to engage in the manufacture of any article subject to taxation under the provisions of this act, and every dealer having taxable articles in his possession upon which taxes have not been paid, must furnish a bond to The People of Porto Rico in such sum as the Treasurer may require, and this bond is "liable" not only for all taxes but also for all fines that may be imposed for any violation of the act (Sec. 23).

Manufacturers of articles subject to taxation must keep stock books to be obtained from the Treasurer at the price of one cent per page, and all merchandise manufactured in one day must be entered at the end of that day, and each sale must be entered therein before any article is removed from the factory (Secs. 24, 25). A failure to comply with the provisions of the act regarding the stock books is a misdemeanor, and any unregistered product "may be seized by the Treasurer of Porto Rico or by his agents and by him sold for the benefit of the people of Porto Rico" (Sec. 27).

The taxes are to be paid by fixing and cancelling internal revenue stamps on documents and articles (Secs. 35, 71). Lack of the required stamps constitutes a misdemeanor (Sec. 35).

Internal revenue agents may enter any establishment to examine books and documents connected with the sale of articles subject to the tax (Sec. 43). The Treasurer may compel any person engaged in the manufacture or sale of any article subject to tax to make such alterations in buildings and equipment as he may think necessary to prevent fraud (Sec. 44). He also has power to determine the size and character of the packages in which taxable merchandise shall be stored (Sec. 46). For a failure to comply with the

Treasurer's requirements the Treasurer may revoke the license to do business (Sec. 46).

The following are made *misdemeanors*: Failure to declare the correct quantity of goods (Sec. 49); failure to pay the tax on the sale, transfer, use or consumption of any article subject to taxation (Secs. 50, 79); refusal to furnish documents or reports to the Treasurer or his agents when required by them (Sec. 51); removal of goods from a factory without having paid the tax (Sec. 52); continuing to engage in business without giving the required bond (Sec. 53); violation or failure to comply with any provision of the act or with any law relative to internal revenue or with any provision of regulations promulgated thereunder (Sec. 57); failure to file the monthly affidavit of sales (Sec. 78); failure to deliver account books, vouchers or invoices to the taxing officials (Sec. 80); failure to keep books or to enter the sales therein (Sec. 81).

Officers of corporations are liable for penalties assessed against the corporations of which they are officers (Sec. 60).

Sales of articles subject to the sales tax must be entered daily in special books provided by the Treasurer and affidavits must be filed each month showing the gross proceeds of the monthly sales (Secs. 63-67).

Persons bound to make payment of taxes must pay them without waiting to be required to do so (Sec. 68).

The Treasurer is authorized "to *impose and collect, through administrative proceedings*, from any person who fails to observe any of said regulations and in cases of misdemeanor under this act, a *fine* which shall not exceed $25 for each offense, or he may, in his discretion, enter a complaint against said person before the proper court for failure to comply with the regulations or for committing a violation of the law" (Sec. 75). When the Treasurer imposes an "administrative fine" and payment is not made he may institute "distraint proceedings" (id.).

Failure to pay the tax not only constitutes a misdemeanor but also subjects the person so failing to a *penalty* of 10% of the amount due (Sec. 77), and failure to declare a sale is not only a misdemeanor but also subjects the offender to a fine "equal to the amount of the sale or sales which he may have failed to declare, which fine shall be administratively imposed and collected."

This recital of the provisions of the act makes it very clear that, although we have thus far treated these cases as suits for the purpose of restraining the assessment or collection of a *tax*, they are in reality a great deal more. They are suits to restrain the enforcement of the tax statute, and an enforcement of that statute means a great deal more than collecting a tax. Petitioners are endeavoring to restrain seizure of their property, the imposition of penalties and of administrative fines, and prosecutions for misdemeanors.

If extraordinary and exceptional circumstances ever existed they certainly exist in these cases, and *Hill* v. *Wallace* clearly applies.

POINT V.

To construe the Act of March 4, 1927, as depriving petitioners of the right to relief in these cases would render it unconstitutional and void, because as so construed the statute would deprive them of all remedy.

Apart from the remedy by injunction (which respondent insists is now taken away by the new statute), petitioners have no remedy whatever unless it be found in the tax refund statute quoted in the first opinion of the court below (R. 118-124; 16 Fed. 2d 546-548).

That tax-refund-statute is a wholly separate and independent statute, not a part of the tax statute here assailed. It provides that whenever a taxpayer believes a tax is illegal, he nevertheless must pay it under protest and then bring a suit against the Treasurer to recover it. But it is *not* and cannot be applicable to the taxes here involved because it requires that when the payment is made, it must be made under protest *and the protest must be indorsed upon a receipt and the receipt must be annexed to the complaint in the suit to recover the tax so paid* (Secs. 1 and 6, at R. 119-121). The taxes here complained of are paid by means of stamps affixed to the articles sold or documents transferred, *and in the very nature of things no receipt can be obtained and hence no suit to recover can be brought.* The record shows that in once instance the receipt was requested and was refused by the taxing officials (R. 22, 23). In order for a merchant to carry on his business, he must buy stamps in quantity in advance and then attach them to each article as and when the same is sold. He cannot "protest" when he buys a quantity of stamps in advance of any actual sale, because there is then no basis for a protest; and he cannot protest when he affixes the stamp to the article sold unless he make the impossible assumption that an internal revenue agent is going to be present at every sale of every article of merchandise made in Porto Rico.

The tax refund statute was enacted before the enactment of the taxing statute, here assailed, and it never was intended to apply to *stamp* taxes of this kind. Or, if intended to apply, its provisions are such that it *cannot* be complied with. *It affords no remedy whatever.*

Therefore, if the equitable remedy of injunction be taken away, no remedy at all is left.

Although no one may have a vested right to any *par-*

ticular remedy, it is well settled that to take away *all* remedy is to deny due process of law.

> "To give operation to a statute whereby serious losses inflicted by such unlawful means are in fact *made remediless* is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law."
>
> *Truax* v. *Corrigan*, 257 U. S. 312, 330.

> "If the changing or repealing statute leaves the parties *a substantial remedy*, the legislature does not exceed its authority."
>
> *Ettor* v. *Tacoma*, 228 U. S. 148, 155.

> "If, as we have seen, he is denied *all remedy* for the wrong inflicted upon him, the deprivation of his property becomes just as effectual as though it had been taken from him by direct legislative enactment."
>
> *Gilman* v. *Tucker*, 128 N. Y. 190, 202.

See, also:

De Lima v. *Bidwell*, 182 U. S. 1, 199, 200.
Sliosberg v. *N. Y. Life Ins. Co.*, 217 App. Div. 67; aff'd. 244 N. Y. 482.
Reynolds v. *Randall*, 12 R. I. 522, 524, 525.
Price v. *Hopkins*, 13 Mich. 318, 324, per COOLEY, J.
Rhines v. *Clark*, 51 Pa. 96.
Sansberry v. *Hughes*, 174 Ind. 638, 640.

POINT VI.

These cases have not become moot even if the Act of March 4, 1927, be applicable to pending cases.

A case is said to become moot when subsequent events *destroy the actuality of the controversy* and make a decision of the questions presented *unnecessary to a determination of the rights of the parties.*

> *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475.
> *Berry* v. *Davis*, 242 U. S. 468.
> *Public Utility Commissioners* v. *Compania General*, 249 U. S. 425.

The actuality of the present controversy certainly is not destroyed by the Act of March 4, 1927. Whether or not petitioners must pay the taxes imposed by the tax statute of August 20, 1925, and whether they may be fined and imprisoned and their property seized if they make sales without paying such taxes, is still a live controversy, not in any way affected by the Act of March 4, 1927; and a decision of the questions presented is still necessary to a determination of their rights.

During the period which has elapsed since the appeals to the court below were taken (a period which has now lengthened out to one year and nine months) petitioners have been paying to the Clerk of the District Court the amount of the taxes which would become due from them under the terms of the tax statute (R., 63, 81, 105, 138). *The amounts so deposited aggregate very large sums—several hundred thousand dollars at least.*

Whether or not petitioners are entitled to a return of that money, now in the custody and under the control of

the District Court, is far from being a moot or academic question. It presents a controversy of "present actuality."

Respondent's contention as to the effect of the Act of March 4, 1927, goes to the length of asserting that no court could make any order in these cases with respect to the disposition of the vast sums so deposited. And that of itself, we submit, is sufficient to show that his contention should not be sustained.

Conclusion.

We ask that the Act of March 4, 1927, be declared inapplicable, and that the cases be set down for argument upon their merits.

Respectfully submitted,

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Counsel for Petitioners.

September, 1927.

APPENDIX

Extracts from Act No. 85 of August 20, 1925, being the Tax Statute of the Legislature of Porto Rico complained of in these cases.

TITLE II

Excise Taxes

Part I

Section 16.—There shall be collected and paid, once only, an internal revenue tax on each of the following articles:

(Here follow 44 specifically enumerated articles, the production, manufacture, sale, use, or consumption of which in Porto Rico is declared to be subject to a tax).

PART II

DUTIES OF TAXPAYERS

Section 23.—Every person who engages or attempts to engage in the manufacture of any article subject to taxation under the provisions of this Act, shall serve notice thereof, in writing, on the Treasurer of Porto Rico, in such form as the latter may by regulation prescribe, and shall furnish a bond in favor of The People of Porto Rico in such sum as the Treasurer may require, which shall in no case exceed twenty thousand (20,000) dollars. Small manufacturers whose annual output does not exceed one thousand (1,000) dollars shall furnish a maximum bond of one hundred (100) dollars, and the Treasurer of Porto Rico may require a bond in favor of The People of Porto Rico of not

to exceed fifty (50) dollars in cases of manufacturers whose stock of articles subject to taxation is worth less than one thousand (1,000) dollars. Every dealer having taxable articles in his possession upon which taxes have not been paid, shall furnish a bond in favor of The People of Porto Rico in such amount as the Treasurer of Porto Rico may require. The amount of this bond shall be fixed according to the volume of business done. Said bond shall be liable for all taxes and fines that may be imposed upon him for violation of any of the provisions of this Act or of the regulations, and shall be furnished by the principal and two sureties, each of which latter shall possess unencumbered real property in Porto Rico to the value of at least twice the amount of the bond. In lieu of the personal bond above stated, the Treasurer of Porto Rico, in his discretion, may accept a cash bond equal to the amount of the bond, or securities, the amount of which he shall approve, or the undertaking of a surety company duly authorized to transact business in Porto Rico, and which has property or funds subject to attachment in Porto Rico.

Section 24.—Manufacturers of articles subject to taxation shall keep official stock-books in their factories and shall not remove them therefrom, and distillers shall have, in addition to this book, an invoice book for making payment of the tax. The said books shall be furnished by the Treasurer of Porto Rico upon payment of one (1) cent for each page thereof.

Section 25.—In the stock-book, all merchandise completed or manufactured in a natural day shall be entered at the termination of said day, and distillers and manufacturers of cigars or cigarettes shall further enter the internal-revenue stamps at the precise moment of receiving them at the factory, and, further, every manufacturer shall enter in said book, before removing the article from the

factory, each sale or shipment made, including the name and address of the buyer or receiver and the stamps cancelled or the number of the export way-bills covering said articles, and in addition, such other information as the Treasurer of Porto Rico may by regulation prescribe. In cases of distilled spirits, their alcoholic degree and the number of the respective receptacle or receptacles in which such product is contained, shall be entered.

Section 27.—The official invoice and stock-books shall at all times be open to inspection by internal-revenue officers. Every person who fails to comply with any of the provisions of this Act regarding the aforesaid books, shall be guilty of misdemeanor, and the unregistered product may be seized by the Treasurer of Porto Rico or by his agents, and by him sold for the benefit of The People of Porto Rico.

Section 35. That all excise taxes provided for in this Act shall be paid by affixing and cancelling internal revenue stamps on such documents and articles, as for such purpose the Treasurer of Porto Rico may prescribe. Such stamps shall be furnished by the Treasurer of Porto Rico to collectors of internal revenue in such quantities as may be necessary for local needs; *Provided*, That for the purpose of identifying certain taxable articles such as arms and others which, in the judgment of the Treasurer of Porto Rico, it may be necessary to identify so as to prevent fraud, the Treasurer of Porto Rico is hereby authorized, through the promulgation of rules and regulations, to cause to be affixed to the said articles stamps or other adequate marks which shall be furnished gratis to the taxpayers by the Treasurer of Porto Rico; *Provided, further*, That the Treasurer of Porto Rico may affix such stamps on taxable articles acquired while former excise tax laws were in force and which articles are on the market when this Act takes effect.

The lack of such stamps or marks on the articles required by regulations, shall constitute a misdemeanor.

Section 37.—Dealers shall be liable for the payment of the tax upon selling or transferring the taxable article to another dealer or to a consumer.

Section 38.—The consumer shall be liable for the payment of the tax upon coming into possession of the taxable article for use or consumption in Porto Rico.

Section 39.—Taxes prescribed by this Act on the sale, transfer, use or consumption in Porto Rico of articles comprised in section 16 shall be paid by the dealer upon selling or transferring the taxable article to another dealer or to a consumer.

Part III

POWERS OF THE TREASURER

Section 43.—Internal revenue agents may enter any establishment, factory, office or place to examine books and documents connected with the sale, use or manufacture of articles or with the holding of public spectacles subject to this Act.

Section 44.—The Treasurer of Porto Rico shall at all times have power to compel any person engaged in the business of distilling, tobacco manufacturing or in the manufacture, making or sale of any article subject to tax, to make such alterations in buildings, stills, utensils, boilers, vats, tubes, pipes and apparatus in general as he may think necessary for the proper protection of The People of Porto Rico against fraud, and may require such persons to install such notice boards, measuring apparatus, tubes, tanks, retainers, receptacles for the finished or partly finished prod-

uct and such other utensils or things as in his judgment may be necessary.

Section 45.—The Treasurer shall have power to determine the size and character of receptacles and packages in which merchandise taxable under this Act shall be stored within the factory or removed therefrom, and may prescribe by regulations the manner in which the marks and numbers on such receptacles and packages shall be made thereon or erased therefrom.

Section 46.—The license of every person failing or refusing to comply with the requirements of the Treasurer of Porto Rico, with respect to such alterations in buildings, stills, utensils, boilers, vats, tubes, pipes and apparatus in general, or to the size and character of the receptacles and packages, marks and numbers, referred to in this Act, may be revoked by the Treasurer of Porto Rico.

Part IV

PENALTIES

Section 49.—Any person who, for the purpose of payment of the taxes prescribed by this Act, shall for any reason declare smaller quantities than those produced, manufactured, obtained or deducted, shall be guilty of a misdemeanor.

Section 50.—Any person who shall sell, transfer, use or consume any article subject to taxation under this Act, without paying the said tax at the time and in the manner herein provided, shall be guilty of a misdemeanor.

Section 51.—Any person who deals in, handles, has in store, or shall have had merchandise taxable under this Act, and refuses to furnish or prevents the furnishing of

documents or reports in connection therewith to the Treasurer of Porto Rico or to his agents, when required by them, shall be guilty of a misdemeanor.

Section 52.—Any person who sells or disposes of taxable articles or removes them from a factory without having paid the tax thereon in the manner specified in the preceding section, except as the Treasurer of Porto Rico may by regulation prescribe, shall be guilty of a misdemeanor.

Section 53.—Any person who engages in or continues the industry of distilling or manufacturing any taxable article without having furnished a bond in the manner and under the requirements provided by this Act, shall be guilty of a misdemeanor.

Section 57.—Any person who violates or fails to comply with any of the provisions of this Act, or with any law relative to internal revenue, or with any provision of such regulations as may be promulgated thereunder; and any person who knowingly aids, abets or otherwise helps another to violate this Act, or to fail to comply with any of its provisions or with any other law or regulation thereunder relative to the internal revenue of Porto Rico, where no other penalty is specifically provided, shall be guilty of a misdemeanor.

TITLE III

Sales Taxes

Part I

Levying of taxes

Section 62.—There shall be levied and collected on the sale of any articles the object of commerce, not specified in section 16 of this Act or exempted from taxation as pro-

vided in said section, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sales.

Part II

DUTIES OF TAXPAYERS

Section 63.—From and after the date of approval of this Act, persons comprised in the preceding section, whatever the nature of their business may be, shall file on the last day of each month and not later than within the ten days following, an affidavit showing the gross proceeds of the monthly sales made, whether for cash or on credit, of all articles covered and defined by section 62 of this Act.

Section 64.—Said affidavit, showing the total price or value of the articles sold during the month, shall agree absolutely with the entries made in the account books of the person swearing to the affidavit.

Section 65.—For the purpose of complying with this Act, all persons bound to pay the tax provided in section 65 hereof, shall keep books of account under such requirements as the Treasurer of Porto Rico shall by regulation prescribe, in which books they shall daily enter the amount of their sales, whether for cash or on credit, as well as such special books as the Treasurer of Porto Rico may direct: *Provided*, That said books shall be bound and folioed and authorized on the first page by the Treasurer of Porto Rico, a collector of internal revenue or an internal revenue agent.

Section 67. When said affidavit has been sworn to, it shall be forwarded or delivered within the prescribed term to the internal revenue agent of the proper district or to

the collector of internal revenue in the town where the business of the taxpayer is located.

Section 68.—Persons bound hereunder to the payment of the taxes specified in section 62, shall pay such tax without waiting to be required to do so by the internal revenue agents, and they shall make such payments in such form as the Treasurer of Porto Rico may by regulation prescribe.

Section 69.—Every manufacturer, wholesale dealer, retail dealer, representative, commission merchant or any other person making sales, when so required by the duly authorized officers of the Department of Finance shall produce his account books and any other evidence relative to purchases or sales made by him, and shall permit said officers to examine such books and documents and to take note of any entry made therein.

Section 70.—Any person who, after this Act takes effect, commences any business on which he must pay the tax herein prescribed, shall serve written notice on the Treasurer of Porto Rico within the first five days after commencing business. When such business is discontinued, he shall likewise serve notice on the Treasurer of Porto Rico and shall make his affidavit covering such sales as he shall have made during the month in which his business is discontinued.

Part III

PAYMENT OF TAX

Section 71.—The sales tax specified in this Act shall be paid by affixing internal revenue stamps to the documents prepared for the purpose by the Treasurer of Porto Rico and cancelling said stamps on the documents.

Part IV

POWERS OF THE TREASURER

Section 74.—The Treasurer of Porto Rico or, in his stead, any internal revenue agent or any other officer or employee of the Department of Finance, designated by the Treasurer of Porto Rico, shall be authorized to make investigations periodically, or at any time it may be necessary, for the purpose of establishing the truth of the information contained in the affidavits filed.

Section 75.—The Treasurer of Porto Rico is hereby authorized to impose and collect, through administrative proceedings, from any person who fails to observe any of said regulations and in cases of misdemeanor under this Act, a fine which shall not exceed twenty-five (25) dollars for each offense, or he may, in his discretion, enter a complaint against said person before the proper court for failure to comply with the regulations or for committing a violation of the law.

When the Treasurer of Porto Rico imposes an administrative fine in accordance with the preceding provision, and the payment thereof is not made, said official may institute distraint proceedings in order to make said fine effective.

Section 76.—Internal revenue officers are hereby empowered to enter any establishment, the owners or representatives of which are hereby obliged to pay a tax, to ascertain whether or not such owners or representatives are complying with the provisions of this Act.

Part V

PENALTIES

Section 77.—When a person obliged by this Act to pay a tax on the amount of his monthly sales fails to do so in the form and at the time hereby provided, he shall pay, in

addition to said tax and as part thereof, by way of penalty, ten (10) per cent of the amount due.

Section 78.—Any person refusing to file the monthly affidavit of his sales, as hereby required, or who makes a false or fraudulent affidavit, shall be guilty of a misdemeanor and punished by a fine of not less than one hundred (100) dollars nor more than one thousand (1,000) dollars, or by imprisonment for a term of not less than thirty (30) days nor more than one (1) year, or by both penalties, in the discretion of the court.

Section 79.—Every person refusing to pay the tax herein provided shall be guilty of a misdemeanor.

Section 80.—Every person obliged hereby to pay a tax, who refuses to deliver, or through whose fault the account books, business invoices or any other voucher are not delivered to the duly authorized officers of the Department of Finance for examination, shall be guilty of a misdemeanor.

Section 81.—Every person who makes sales, the amount of which must be declared under oath to the Treasurer of Porto Rico in accordance with this Act, without keeping the books hereby required, or without daily entering the total amount of daily sales in said books, or who fails to include the amount of any sale in said total, shall be guilty of a misdemeanor.

Section 82.—Every person who makes sales, the amount of which should be declared under oath to the Treasurer of Porto Rico in accordance with this Act, and fails to declare it, besides being guilty of misdemeanor as defined in the preceding section, shall pay into the Treasury of Porto Rico a fine equal to the amount of the sale or sales which he may have failed to declare, which fine shall be administratively imposed and collected.